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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 60

THE PENNSYLVANIA RAILROAD COMPANY,
PETITIONER,

vs.

CHARLES E. O'ROURKE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 12, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES E. O'ROURKE, Plaintiff-Appellant,

against

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellee

STATEMENT UNDER RULE 15(b)

This action was commenced by Charles E. O'Rourke as plaintiff against The Pennsylvania Railroad Company as defendant by the filing of the complaint on the 13th day of September, 1949, in the United States District Court, Eastern District of New York. Service of the summons and a copy of the complaint having been duly made, the defendant served its answer on the 5th day of October, 1949; by stipulation the defendant's answer was amended on the 3rd day of August, 1950. Pursuant to notice duly given, the Deposition of the plaintiff was taken by the defendant on February 8th, 1950.

Pursuant to notice dated May 31, 1951, and based upon the pleadings, the deposition of the plaintiff, the affidavit of A. Harold Frost, Esq., sworn to on the 31st day of May, 1951, and based also upon certain concessions of fact which appear more specifically in the respective affidavits submitted in behalf of each party, the defendant moved for judgment under Rules of Civil Procedure 12b(6), 56b, and 56d. In opposition thereto the plaintiff submitted an affidavit by Herbert Zelenko, Esq., sworn to on the 12th day of June, 1951. The motion having regularly come on to be heard on the 13th day of June, 1951, before Hon. Harold M. Kennedy, United States District Judge, said motion, by decision dated July 12, 1951, was granted on [fol. 2] August 3, 1951, dismissing the complaint and awarding the defendant costs as taxed.

An order having been duly entered, judgment for the defendant, and against the plaintiff, dismissing the complaint, with $48.50 costs, was entered by the Clerk of the

District Court of the United States for the Eastern District of New York on the 9th day of August, 1951.

The plaintiff filed its notice of appeal from the said judgment on the 16th day of August, 1951.

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

Civil Action File No. 10266.

CHARLES E. O'ROURKE, Plaintiff,

against

THE PENNSYLVANIA RAILROAD COMPANY, Defendant.

SUMMONS—September 13, 1949

To the above named Defendant:

You are hereby summoned and required to serve upon Herbert Zelenko, plaintiff's attorney, whose address is One Park Place, New York City, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the [fol. 3] day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

PERCY G. B. GILKES,
Clerk of Court,
By SIDNEY R. FEUER,
Deputy Clerk.
(Seal of Court)

IN UNITED STATES DISTRICT COURT,

[Title omitted]

COMPLAINT

Plaintiff hereby demands a trial by jury

10266

Plaintiff, complaining of the defendant, alleges as follows:

First. That heretofore and at all the times hereinafter mentioned, the defendant was and still is a steam surface railroad corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and at all the times herein mentioned was and still is doing business within the jurisdiction of this Court.

[fol. 4] Second. That heretofore and at all the times hereinafter mentioned, the defendant carried passengers and freight for hire from the State of New Jersey to other states and from other states to the State of New Jersey, and at all the times herein mentioned was engaged in the business of interstate commerce.

Third. That this action is brought under the Federal Employers' Liability Act and the Safety Appliance Acts.

Fourth. That heretofore and at all the times hereinafter mentioned, defendant maintained, operated and controlled a certain railroad yard known as the Jersey City Yard, at Jersey City, State of New Jersey, which contained the defendant's rails, tracks, switches, sidings, roadbeds, docks, piers and turnouts, over, through and upon which the defendant operated locomotives, engines, trains and cars under its control.

Fifth. That on or about January 28th, 1948, plaintiff was employed by the defendant as a brakeman at the defendant's said Jersey City Yard, at Jersey City, in the State of New Jersey and his duties consisted of classifying, drilling and shifting cars and making up trains and being a brakeman in the general interstate service of the defendant, all in the furtherance of the defendant's business of interstate commerce.

Sixth. That on or about January 28th, 1948, plaintiff was employed by the defendant as a brakeman at the defendant's said Jersey City Yard, at Jersey City, in the State of New Jersey, and was engaged in the defendant's business of interstate commerce.

Seventh. That at the said time as aforesaid, while plaintiff was employed by the defendant as a brakeman at the said place as aforesaid and was performing his duties pur- [fol. 5] suant to the orders, instructions and directions of the defendant, its vice-principal or agent from whom he was obliged to and did take his orders, instructions and directions and while plaintiff was riding a car and attempting to release the brake in the usual and customary manner, suddenly by reason of the negligence and carelessness of the defendant, its agents, servants and employees and without any fault or negligence on the part of the plaintiff contributing thereto, and by reason of the defective, improper and inefficient condition of the said brakes and all the appurtenances connected therewith, the said brake was caused to give and spin in an abnormal and unusual manner and by reason of which plaintiff was precipitated from his position and thrown to the ground and as a result thereof he sustained the severe and permanent injuries hereinafter mentioned.

Eighth. That at the said time and place hereinbefore mentioned, the defendant, its agents, servants and employees were negligent and careless in that they negligently and carelessly maintained the brakes and all the appurtenances connected therewith upon the said car in a defective, improper and inefficient condition in violation of the Acts of Congress known as the Safety Appliance Acts and the rules and regulations of the Interstate Commerce Commission in such cases made and provided and appertaining thereto; in that they negligently and carelessly failed to give the plaintiff any notice or warning of the defective, improper and inefficient condition of the said brakes and all the appurtenances connected therewith; in that they negligently and carelessly failed to properly inspect and repair the defective, improper and inefficient condition of the said brakes and all the appurtenances connected therewith; in that they negligently and carelessly violated the rules, regulations, customs and practices existing at the

said time and place; in that they negligently and care-
[fol. 6] lessly failed to provide plaintiff with a safe place in which to work and to maintain the same in a reasonably safe condition; in that the defendant was negligent and careless in other respects.

Ninth: That as a result of the above-mentioned premises, the plaintiff was severly injured in and about his head, body and limbs; he was injured both internally and externally; he suffered and still suffers great pain and mental anguish; he suffered and still suffers from nervous shock and debility; he will be compelled to expend sums of money for medicines and medical treatments; he has been and will be prevented from attending to his usual work and earning his livelihood, all to his damage in the sum of One hundred thousand and 00/100 ($100,000.00) Dollars.

Wherefore, plaintiff demands judgment against the defendant in the sum of One hundred thousand and 00/100 ($100,000.00) Dollars, besides the costs and disbursements of this action.

Herbert Zelenko, Attorney for Plaintiff,. Office & P. O. Address, One Park Place, Borough of Manhattan, City of New York.

[fol. 7] IN UNITED STATES DISTRICT COURT

ANSWER—October 5, 1949

The defendant answering the complaint herein:

I. Admits the allegations contained in paragraphs numbered "First", "Second" and Fourth" of the complaint.

II. Upon information and belief, denies each and every allegation contained in paragraphs numbered "Third", "Sixth", Seventh", "Eighth" and "Ninth" of the complaint.

III. Admits that on or about January 28, 1948, plaintiff was employed by the defendant as a freight brakeman at its Harsimus Cove Freight Yards, Jersey City, New Jersey, but except as so admitted denies each and every allegation contained in paragraph numbered "Fifth" of the complaint.

IV. Except as hereinbefore admitted or otherwise controverted, denies each and every allegation contained in the complaint.

The defendant further answering and for a first, separate and complete defense to the cause of action, if any, alleged in the complaint, alleges:

V. That the plaintiff was employed by it as a freight brakeman engaged in unloading cars from a car float at the defendant's Harsimus Cove Freight Yards, Jersey City, New Jersey, and that while so employed and while on said car float plaintiff received the injuries, if any, [fol. 8] herein complained of; that at said time there was in full force and effect an act of the Congress of the United States known as Longshoremen's and Harbor Workers' Compensation Act, 1927, and subsequent amendments thereto; that the defendant at the said time had fully complied with the requirements of said Act; that at the said time plaintiff and defendant were within the provisions of said Act; that since the time mentioned in the complaint defendant has paid compensation to plaintiff pursuant to the requirements of said Act; that by reason of the premises plaintiff is not entitled to any recovery in this action.

Wherefore, the defendant asks that the complaint herein be dismissed with costs.

Dated: New York, N. Y., October 5, 1949.

Conboy, Hewitt, O'Brien & Boardman, by Edward F. Butler, Member of Firm, Attorneys for Defendant, 39 Broadway, New York 6, N. Y.

[fol. 9] IN UNITED STATES DISTRICT COURT

STIPULATION AMENDING ANSWER—August 3, 1950

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the defendant's answer be and the same hereby is amended to include the following:

The defendant further answering and for a first, separate

and partial defense to the cause of action, if any, alleged in the complaint, alleges:

VI. That if the plaintiff was injured, as is alleged in the complaint, his own negligence contributed to his injuries, and the defendant did not violate any Statute or Statutes enacted for the safety of its employees.

Dated: New York, N. Y., August 3, 1950.

Herbert Zelenko, Attorney for Plaintiff. Conboy, Hewitt, O'Brien & Boardman, Attorneys for Defendant.

[fol. 10] IN UNITED STATES DISTRICT COURT

DEPOSITION OF THE PLAINTIFF

39 Broadway, New York, N. Y.,
February 8, 1950, 2:00 P. M.

Deposition of the plaintiff taken at the office of Conboy, Hewitt, O'Brien & Boardman, 39 Broadway, New York 6, N. Y., at 2.00 P. M. on February 8, 1950, pursuant to notice dated October 5, 1949, as adjourned to the above time and date by agreement of counsel.

APPEARANCESS

Herbert Zelenko, Esq., Attorney for Plaintiff; Harold L. Schwartz, Esq., of Counsel.

Messrs. Conboy, Hewitt, O'Brien & Boardman, Attorneys for the Defendant; Arthur R. Douglass, Esq., of Counsel.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that sealing, certification and filing of the within deposition be and the same are hereby waived, and that the attorney for the plaintiff shall be furnished with a copy thereof without charge;

It is further stipulated and agreed that the witness may be sworn at the taking of his deposition by any notary pub-[fol. 11] lic of the State of New York, and that the witness may read, sign and swear to his testimony when the same is transcribed before any notary public of the State of New York;

It is further stipulated and agreed that all objections, except as to the form of questions, be and the same are hereby reserved to the trial of the action.

CHARLES E. O'ROURKE, the plaintiff, being first duly sworn, testified as follows:

By Mr. Douglass:

Q. What is your name?
A. Charles E. O'Rourke.
Q. How old are you?
A. 45.
Q. Where do you live?
A. 2112 Dorchester Road, Brooklyn.
Q. Are you married?
A. Yes.
Q. Do you have any children?
A. One.
Q. How long have you lived at 2112 Dorchester Road, Brooklyn?
A. Oh, since 1943 I moved there.
Q. Where did you live before that—in Brooklyn?
A. Oh, yes. I have been in Brooklyn since 1926.
Q. How long have you been working for the Pennsylvania Railroad?
A. Since December, 1942.
Q. What did you do before that?
A. Oh, I drove a truck, chauffeur.
Q. Did you work in New York City?
A. Yes, sir.
Q. Who was your last employer before you worked for the Pennsylvania Railroad?
A. Well, I was working with the loaders on the dock. I worked with a three-man crew.
Q. Do you mean you did stevedoring work?
A. Yes, sir.
[fol. 12] Q. And how long prior to 1942 had you done that sort of work?
A. I was only there about three or four months. Before that I was driving a truck.

Q. Whom did you drive a truck for?

A. John J. Cassell. It was his trucks. John Randalls was the company I worked for.

Q. How long did you work for them?

A. Oh, about five years.

Q. Are they here in New York City?

A. Yes.

Q. When you went to work for the Pennsylvania Railroad in 1942, in what capacity were you hired?

A. Freight brakeman.

Q. Where did you start to work?

A. Jersey City.

Q. Have you always worked at Jersey City?

A. Always, yes.

Q. As a freight brakeman, what sort of work did you do?

A. Drill cars, make up trains.

Q. At the Jersey City Yards?

A. It is known as the cove, H Cove.

Q. Harsimus Cove Yards, Jersey City?

A. Yes.

Q. And have you always worked at Harsimus Cove Yards while you have been working for the railroad?

A. Always, yes—up to the present.

Q. Where are you working now?

A. Penn Station.

Q. New York City?

A. New York City.

Q. And how long have you worked as a freight brakeman in Penn Station?

A. Well, it is considered freight but we handle passenger equipment.

Q. In your work at the Harsimus Cove Yards did you do any work on car floats?

A. Yes.

Q. Did you work on car floats every day?

A. No. I wouldn't say every day, no.

Q. Well, three or four times a week?

A. Well, it depends on the job we had.

Q. From time to time you were required to work on car floats; is that right?

A. Yes.

[fol. 13] Q. And when you worked on these car floats what type of work did you do?

A. Take the hand brakes off.

Q. You took the hand brakes off the freight cars on the car floats; is that correct?

A. Yes, sir.

Q. Freight cars which had come across the river into Harsimus Cove?

A. Yes, sir.

Q. And is it a fair statement to make that you as a member of a drill crew would take these freight cars off the car floats and make them up into a train?

A. That's it—drill them out, pull them out into the yard and drill them.

Q. And what specifically would you have to do with the cars on the car floats?

A. Well, take the handbrakes off.

Q. Take the handbrakes off?

A. Yes.

Q. Did you do anything else?

A. Well, no. One man coupled up. My job was to go over and release the handbrakes.

Q. On the cars on the car floats?

A. Yes, sir.

Q. That, is when you worked on car floats?

A. Yes.

Q. To the best of your recollection is that the only thing you did when you worked on cars on cars floats?

A. It depends on what I wanted to work at. Sometimes I might pull the pin or couple up and sometimes the other fellow might couple up and pull the pin. I had more or less of a conductor's job.

Q. In January of 1948 did you have an accident?

A. Yes.

Q. Was that on January 28?

A. January 28.

Q. What time did you report for duty on that day?

A. 3.59.

Q. P. M. or A. M.?

A. P. M., in the afternoon.

Q. What was your tour of duty?

A. 3.59 to 11.59.

Q. And who was in your crew that day?

A. Well, we had the engineer——

Q. What was his name?

A. Fisher, Carl Fisher. I don't know—I forget the fireman's name. Paddy Kilcullen was the conductor, Roach the brakeman.

[fol. 14] Q. He was the other brakeman?

A. Yes.

Q. So that you had an engineer, a fireman, a conductor, another freight brakeman and yourself?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Did your crew have any designation or number?

A. 32-B.

Q. Had you worked with that crew before?

A. Oh, yes. I was a regular member of that crew.

Q. How long had you worked with those men?

A. A couple of months, I imagine.

Q. Had you worked regularly with them during the two-month period or couple of months prior to January 28, 1948?

A. I just forget because I know I had been on the job. I just forget when I got on.

Q. Was that your regular tour of duty, 3.59 to 11.59 P. M.?

A. That's right.

Q. What was the weather like on January 28, 1948?

A. I forget now. I know it was kind of clear that night.

Q. Had it been snowing at any time during the day?

A. I don't think it did. I don't think it snowed that day. I just couldn't swear yes. I couldn't swear no.

Q. You don't know whether it snowed or rained or whether it was clear that day?

A. No. It did not rain.

Q. Is it your best recollection that if was clear that day?

A. It was clear.

Q. Did there come a time when you were going to move some freight cars from a car float on the night of January 28, 1948?

A. Yes.

Q. About what time was that?

A. Oh, around—I imagine around, between 9.30 and 10.00. I am not sure of the time.

Q. Were those the first freight cars you had taken off a float on that day?

A. No.

Q. You had taken off others?

A. Yes. We had taken off cars from three or four floats.

Q. What had you been doing just before you started to move this particular car off this particular car float be-
[fol. 15] tween 9.30 and 10.00?

A. We went down with an engine and pusher—it is like a flat car—and got the cars off.

Q. Before you started that particular assignment do you recall what your assignment was?

A. We pulled in there before that and we went down to get this other float.

Q. And when you went down to get this other float how did you go down—on the locomotive?

A. No. I went on the pusher. The crew rides the pusher.

Q. When you say pusher, what do you mean?

A. Flat car. You cannot go on the float with an engine. You use this flat car. It is like a regular house.

Q. And that flat car is backed onto the float?

A. Yes, and coupled up.

Q. You went on the car float on the pusher?

A. Yes.

Q. What did you do when you got there?

A. Coupled up, and the conductor went to take the numbers, which it is his duty to take the numbers of the cars, and I got on the car—I went on the top of the car to take the brakes off.

Q. When you say you coupled up the pusher, coupled up to what?

A. The pusher coupled up to the head car on the north side, the box car.

Q. You mean the head box car on the float?

A. Yes.

Mr. Schwartz: On the north side.

Q. How many tracks were there on the float?

A. Two. There is two sets, like one on the north and one on the south.

Q. And the float was tied up to a pier, was it?

A. Tied up, yes.

Q. And when you got down there was the pusher taken onto the float?

A. It was taken onto the float. We had the green light to go in.

Q. In which direction was the float facing—north and south or east and west?

A. East and west.

[fol. 16] Q. And there were two tracks on the float?

A. Yes.

Q. So that the float would have a north side and a south side?

A. North side and south side.

Q. As you went on it to do your work?

A. Yes, sir.

Q. Were there cars on either track?

A. North and south.

Q. There were cars on the north track?

A. Yes.

Q. How many cars were on the north track?

A. Five.

Q. And how many cars were on the south track?

A. Five.

Q. Five on both tracks?

A. Yes. That is ten cars. We had ten cars to pull. It was a ten-car float.

Q. You say the pusher coupled up to the cars on one of the tracks; is that correct, sir?

A. That's right.

Q. To which cars—the cars on the north side or on the south side?

A. On the north side.

Q. Who made that coupling?

A. Well, the three of us was actually there when we done it, see?

Q. Do you recall who actually made the coupling?

A. I think it was Roach who made it.

Q. He was the other brakeman?

A. He was the other brakeman.

Q. After the coupling was made, what did you do?

A. I climbed up on the north side and took the hand brakes off.

Q. And what kind of cars were those on the north side track?

A. Box cars.

Q. They were all box cars?

A. Yes.

Q. And you say you took the brakes off those box cars?

A. On the north side.

Q. How did you walk—from front to rear or rear to front?

A. No. You start from the westward, the front end of the float, and you walk toward the rear, toward the river. You are going towards the river, and you cross over and work back. That is the way.

[fol. 17] Q. So that on the north side track you walked from the front to the rear and when you finished that you walked from the rear to the front on the south track?

A. Yes.

Q. Did you take the brakes off the cars on the north track?

A. Yes, sir.

Q. And did you get them all off?

A. They all came off.

Q. Do you recall what type of brakes they were on the box cars on the north side?

A. They were brakes, stem winders and Ajax, both.

Q. You don't recall?

A. No.

Q. But you do remember they were different kinds?

A. Yes.

Q. Did you have a brake club with you?

A. No. I had one on the pusher, but we very seldom use it.

Q. You did not carry it with you when you took the brakes off the cars on the north side track?

A. No, sir.

Q. Did you have a light with you?

A. Yes.

Q. What kind of a light?

A. An electric lamp. The company supplies that.

Q. And did you have anything else with you?
A. That's all.
Q. Were you wearing gloves?
A. Wearing gloves.
Q. Was it cold?
A. Well, it was kind of cold, cold enough to wear gloves.
Q. Now, while you were taking the brakes off the cars on the north side track what was your conductor doing?
A. Taking the numbers.
Q. You mean he was going along the south side?
A. No. He goes along the platform in the middle.
Q. He was taking the numbers of the cars and putting them down on a piece of paper?
A. That's right.
Q. Between the two tracks there is a platform, is there not?
A. Yes.
Q. What was the other brakeman doing, Roach?
A. He was in the pusher getting warm.
[fol. 18] Q. What was his assignment to be? What was he going to do?
A. The next move was he backs up the north side, throws the switch, and then starts the engine and the crew back, and we make the move over on the south side.
Q. How do you know he was in the pusher when you were taking the brakes off the cars?
A. Because when I went upstairs, climbed up, I saw him there.
Q. Did you leave him in the pusher?
A. I left him in the pusher.
Q. The pusher has an enclosed cabin, has it?
A. In the middle.
Q. And you don't know whether he stayed in there all the time you were taking the brakes off the cars on the north side, do you?
A. No. He was in there when I went up, though.
Q. Now, after you finished releasing the brakes on the last car on the north track, what did you do?
A. I went over to the south side, you see, what you call an apron, you know, like an umbrella. You can go from one car over under the umbrella and step to the other side.
Q. Where is the apron or umbrella—on the ground?

A. Yes. It is built over the platform. Here is the platform. You have what you call an umbrella or what we call an apron.

Q. And how high is it?

A. Even with the top of the box cars.

Q. And it is directly over the platform which runs down the middle of the float between the two tracks?

A. Yes.

Q. Is it metal?

A. That one is metal; some is wood.

Q. You went from the last car on the north side to the last car on the south side; is that correct?

A. Yes.

Q. And you released the brake on the last car on the south track?

A. Yes.

Q. By the way, how did you go when you went from car to car? You didn't climb down, did you?

A. Yes. You have to. There is a little platform the [fol. 19] dog is on. The only time you don't climb down is if it is an Ajax.

Q. I mean, having released the brake on one car, how did you get to the next car?

A. You walk over to the next car.

Q. You don't climb down the ladder, do you?

A. No. You usually walk along what you call the apron or umbrella. You can step from one car to the other.

Q. Then after you released the brakes or brake on the last car on the north side you went to the brakes on the last car on the south side; is that right?

A. Yes.

Q. Where was that brake located, on the east end of the car or the west end of the car?

A. On the north.

Q. Let me ask you this: Was it located towards the rear of the float or the front of the float as it was moored to the dock?

A. That is one thing I cannot answer. I don't remember that far back.

Q. After you finished releasing the brake on the last car, you went to the second car?

A. The second car.

Q. The second from the last?

A. Yes.

Q. Did you have to walk the length of that car before you got to the brake or was the brake at the end of the car where you stepped from the last car to the next to the last car?

A. I don't remember that far back.

Q. When you got onto the next to the last car on the south track, what did you do?

A. I tried to release the brakes.

Q. What kind of a car was it—box car?

A. Box car.

Q. What type of brake did it have?

(Colloquy off the record.)

Q. You released the brakes on the next to the last car?

A. Yes.

Q. And then you got on the next car and released the brakes on the next car?

A. Yes.

Q. And then did there come a time when you got to the——

A. Third.

[fol. 20] Q. —third car from the rear or second car from the front?

A. Yes, and then I walked to the west end of it.

Q. You walked to the west end of the second car from the front; is that correct?

A. Yes.

Q. That would be the end closest to the front of the float as it was moored at the pier?

A. Yes.

Q. And did you walk along the top of that car or did you walk along the apron?

A. I walked along the apron and then I stepped on the car.

Q. On the west end?

A. On the west end. There is a space about that much where there is grab irons. I stepped down there and went down on the ladder.

Q. You went down on the side ladder?

A. There is one on the front. You can't go down on the side because the apron is too close.

Q. The end ladder?

A. Yes.

Q. West end ladder?

A. Yes.

Q. Was that the ladder closest to the apron?

A. Yes.

Q. By the way, were there two ladders on the west end of the car or just one?

A. There is one on the north side of the car and one on the south side.

Q. I am talking about the end of the car. There was only one ladder on the end?

A. Yes, and that was next to the apron.

Q. That was closest to the apron?

A. Yes.

Q. On the west end of the car, and you remember starting to climb down off that ladder?

A. I got down off the ladder. There is a little platform you stand on.

Q. The brake platform?

A. Yes.

Q. How far below the top of the car was the brake platform?

A. I imagine a little higher than this desk.

Q. About three feet?

A. I imagine something like that. They are always standard.

Q. Was the brake platform on the north side or the south side of the car?

A. The north side.

[fol. 21] Q. The same side as the ladder on the west end?

A. Yes.

Q. What type of brake was it?

A. Stem winder.

Q. You mean a wheel and staff brake?

A. Yes, sir.

Q. With respect to the roof of the car, where was the brake wheel located?

A. About that high off the roof.

Mr. Schwartz: You mean it was above the roof of the car?
The Witness: A little bit.
Mr. Schwartz: Seven or eight inches, Mr. Douglass?
The Witness: I was standing like this.
Mr. Douglass: About ten or twelve inches.
The Witness: I imagine like that. You see, some of them stick way up like this, and this one was about like that.

Q. About eight to twelve inches above the roof of the car?
A. Yes.
Q. Now, did you have your lantern with you at that time?
A. Oh, yes.
Q. Where were you carrying the lantern?
A. On my arm. I always carried it there.
Q. Which arm?
A. The left one.
Q. Left arm?
A. Yes.
Q. The crook of your elbow?
A. The crook of my elbow.
Q. And you didn't have any brake club?
A. No.
Q. Before you started to release this brake what position did you take on the platform?
A. I was standing there and I braced myself and I grabbed ahold of the wheel.
Q. In which direction were you facing?
A. I would be facing east.
Q. And was the brake wheel right in front of you?
A. Right in front of me.
Q. And were your feet on either side of the brake stem?
A. Yes.

[fol. 22] Q. Do you mean by that that you straddled the brake stem but your feet were on a line—
A. Like even, like this.
Q. With respect to your body, where was the brake wheel before you started to release the brake? I mean by that how high up on your body was it? Was it even with your chest or stomach?
A. About here.
Q. About your chest?
A. About my chest. Maybe a little below.

Q. Now, how did you release this brake? How did you start to release it?

A. You have to get a grip on it.

Q. You took a grip with both hands?

A. Yes. There is a little dog down there. You have to release the dog when you pull it. You have to give it a little twist like this so that you can release it. The dog wouldn't release, and so I just let go for a second, and when I gave it a second twist she went on me, and then I lost my balance and went.

Q. You put both hands on the brake wheel?

A. Yes.

Q. And the next thing you did was to kick out the dog; is that correct, sir?

A. You release it.

Q. The dog fits into the teeth of a ratchet; is that right?

A. Yes. You can only kick it with your foot.

Q. Which foot did you use to kick out the dog?

A. The left.

Q. Before you kicked out the dog did you exert any pressure on the wheel?

A. I did.

Q. Before you kicked out the dog?

A. Yes.

Q. Did the wheel turn at all?

A. Didn't even budge.

Q. This was before you kicked out the dog?

A. Yes.

Q. Did you kick out the dog?

A. I must have kicked it out because when I gave the second pull and it threw me that is how I went, and the wheel spun around.

Q. You say you put both hands on the wheel and exerted pressure on the wheel in which direction—clockwise?

A. Clockwise.

[fol. 23] Q. And the wheel wouldn't turn?

A. Wouldn't turn the first time.

Q. Before you did that did you try to kick out the dog?

A. No. We never try to kick the dog out first. We always make it a habit of trying your wheel.

Q. When you found that the wheel wouldn't turn, what did you do?

A. I got another grip on it.
Q. You exerted more pressure?
A. More pressure on it.
Q. Did the wheel then turn?
A. That is when she gives a sudden jerk on me.
Q. You mean it gave a sudden jerk?
A. Yes.
Q. In which direction?
A. This way.

Mr. Schwartz: Clockwise. That is when I lost my balance.

Q. Where was your left foot at that time?
A. They were both on that little platform. You see, the platform is only about that long.
Q. Had you tried to kick out the dog?
A. I can't remember that because, you see, when we get there we put our foot like that by the dog. We always do that.
Q. Under the custom and practice when you attempt to release a brake of this type when do you kick out the dog?
A. Sometimes it ain't even on there. It all depends. Sometimes the dog ain't even in.
Q. Was this dog in?
A. I think it was. I wouldn't swear to it.
Q. Let me ask you again, Mr. O'Rourke: Under the custom and practice when you are releasing what you call a stem winder brake when do you kick out the dog?
A. After you put pressure on.
Q. After you move the wheel clockwise?
A. You are supposed to move the wheel first; otherwise she is in that groove tight, and, naturally you can't kick that dog out.
[fol. 24] Q. And you say that after first applying pressure the wheel did not turn; is that right?
A. That's correct.
Q. And then you got another grip on the wheel and applied pressure in a clockwise direction and the wheel suddenly turned?
A. Yes.
Q. In a clockwise direction?
A. Do you call that clockwise direction? Yes.
Q. How much of a turn?

A. Oh, I don't——

Q. A quarter of a turn of the wheel?

A. I don't say that.

Q. More than a quarter of a turn of the wheel?

A. That I can't say anyhow, because I went so quick.

Q. Well, was it a quarter; was it at least a quarter of a turn——

A. It must be, yes.

Q. —or was it half a turn?

A. Let us see. I was standing like this when she went like that. That was at least——

Q. Do you know what I mean by half a turn of the wheel?

A. Halfway around?

Q. A full turn of the wheel would be——

A. Like this, you mean—like that to make a complete turn?

A. That's right.

(Colloquy off the record.)

The Witness: She went at least a good quarter of a turn or better.

Q. So that to the best of your recollection the wheel turned in a clockwise direction at least a quarter of a turn?

A. Yes.

Q. Did it move as much as half a turn?

A. That I don't know because I went down so quick.

Q. Well, you don't know then whether it moved half a turn? You don't remember?

A. I don't remember. It is a couple of years ago.

Q. After it moved suddenly, as you say, in a clockwise direction, what happened?

A. I just went down. I landed on the platform.

[fol. 25] Q. What happened to the wheel? Did it continue to go in a clockwise direction?

A. No. It spun back.

Q. You mean it turned suddenly in the other direction?

A. Yes.

Q. Did you still have your hands on the wheel when it started to turn in the other direction?

A. Not that I know of. I don't think so—not that I know of, because when it spun that is when I lost my balance

and I went. No. I don't think I had my hand on it at the minute it went into reverse.

Q. Did you release your grip on the wheel when it turned in a clockwise direction or when it started to turn in the other direction?

A. I just can't remember now. The only thing I know, when it spun me like this that is when it threw me off balance and I went.

Q. You mean when it turned in a clockwise direction it threw you off balance?

A. Yes.

Q. But you don't remember whether you had your hands on the wheel when it started to turn in a counterclockwise direction?

A. No.

Q. And you don't remember whether or not you kicked the dog out?

A. No.

Q. Before you started to exert stress on the wheel in a clockwise direction did you look to see whether the dog was in the ratchet?

A. No. I did not.

Q. You did not?

A. No.

Q. When you lost your balance, what happened?

A. I just went down, went in between the two cars. I landed on the platform.

Q. Between what two cars?

A. The car I was taking the brake off and the head car.

Q. You landed on the platform?

A. Yes.

Q. You didn't actually land between the two cars themselves did you?

A. Well, here is the position I landed. Here is the car coupled up. I fell from this one and when I landed I landed this way, my feet in between what you call the pit.

[fol. 26] Q. And you landed on the platform; is that correct?

A. Yes.

Q. Was your entire body on the platform?

A. No. This here, the cheek here—that is all. I must have grabbed on the way down.

Q. The buttocks?

A. Yes, because I had two little bruises right there on the buttocks.

Q. Where were your legs?

A. They were hanging down in between off the platform. Like, say, this is the platform. They were hanging down here.

Q. How much higher than the tracks is the platform?

A. The tracks is lower than the platform.

Q. Yes, but how much higher than the tracks is the platform?

A. It comes about even with the door.

Q. Of a freight car?

A. Yes.

Q. Would you say it was about three or four feet above the tracks?

A. Something like that, yes.

Q. You didn't fall off the platform, did you?

A. No. I grabbed the bottom rung there. That saved me.

Q. The bottom rung of what?

A. Of the car. That saved me from going into the knuckles.

Q. By bottom rung are you referring to the ladder?

A. One of the ladder rungs.

Q. Which ladder?

A. On the car I fell off.

Q. Are you referring to the ladder on the side of the car or on the end of the car?

A. The end.

Q. That is the ladder on the west end of the car close to the platform?

A. Yes.

Q. You say you grabbed one of the rungs of that ladder on the west end of the car?

A. Yes. That is when the conductor saw me there.

Q. And at that time your buttocks were on the platform?

A. Yes.

Q. And your legs were hanging over the edge of the platform between the cars?

A. Yes.

Q. Did you grab this rung with both hands?

A. Yes.

[fol. 27] Q. Both your right hand and left hand?

A. Both. I grabbed quick, and then I eased down into the—I eased off the platform down to the pit.

Q. You say the conductor saw you?

A. After I fell.

Q. Did you see him?

A. Yes.

Q. When did you see him?

A. Right there. He just passed me by as I came down.

Q. Was there any ice on any of the cars?

A. I imagine there was a little snow on some of them.

Q. Do you remember whether there was any ice on any of the cars?

A. No.

Q. You don't remember?

A. No.

Q. You say you imagine there was a little snow?

A. Well, some cars that were coming in, they had snow.

Q. I am talking about these cars.

A. I don't know about the ones I was on.

Q. I am talking about these cars on which you were working that night.

A. That I couldn't say.

Q. I mean the cars you were working on on this particular car float, do you recall whether there was any ice on any of those cars?

A. There was no ice.

Q. There was no ice?

A. There was no ice, no.

Q. Now, at the time you were working on the cars on the south track was the locomotive or the pusher car attached to that cut of cars?

A. No.

Q. It was still attached to the cars on the north track; is that correct?

A. Yes, sir.

Q. At the time you were attempting to release the brake on this car which was the second from the front was there any movement of the cars?

A. No.

Q. What did you do after the conductor came along?

A. He told me to go up in the pusher. I went to the pusher.

Q. Was Roach there?

A. Roach was in there and he asked what was wrong.

Q. What did you do then?

A. I just stayed in the pusher and waited until they pulled [fol. 28] the float, and then they went up to Number Ten office where they put the cars. They continued to pull the float, and by that time they had an ambulance and the doctor there. Then is when he ordered me to the hospital.

Q. You were taken to the hospital?

A. Yes—St. Francis.

Q. How long were you there?

A. I was there about five days, I think, the whole total.

Q. Who took care of you while you were there?

A. Dr. Brick.

Q. How long were you away from work?

A. The first time 28 days.

Q. What do you mean by the first time?

A. I was off 28 days.

Q. And then you went back to work?

A. Then I went to work and started to lose a lot of time.

Q. Who was treating you during the first 28 days you were away?

A. Penn Station.

Q. You mean the company doctor at Penn Station?

A. Company doctor.

Q. Is that right?

A. Yes. I went there three times a week.

Q. You went back to work after you were out for 28 days?

A. Yes. He told me to go to work; so I took him at his word.

Q. Did you go back to work?

A. Yes. I went back.

Q. And then you say you lost some time after that?

A. Yes. I used to work a day or two and then had to stay off.

(Colloquy off the record.)

Q. You say you lost time after you went back to work?

A. Yes.

Q. Why was that?

A. I kept getting pains in the back, and my legs getting numb.

Q. Where?

A. In the base of my spine.

[fol. 29] Q. In the base of the spine—in the middle of the back?

A. No. In the middle of the leg down, and my legs were getting numb all the time.

Q. Did there come a time when you went back to the hospital?

A. No.

Q. You never went back to the hospital?

A. Not on my own account. I went to see the doctor myself.

Q. Did you go back at some time to a hospital?

A. No. Not until they ordered me to Cornell's office.

Q. Were you sent to a hospital then?

A. Yes.

Q. And an operation performed?

A. Yes.

Q. When did you return to work?

A. May 16.

Q. 1949?

A. 1949. I was off nine months.

Q. Have you continued to work steadily since that time?

A. No. When I went back to Jersey City I lost time again. Why did you lose time?

A. I used to get numb from here down, from here bending.

Q. From the waist down?

A. Yes, and my arms got numb on me, too, even today.

Q. You went to Jersey City after you went back to work the second time?

A. After the operation.

Q. And how long did you work at Jersey City?

A. I forget now. I was there, I think, a month. Anyway, it could not be more than three months.

Q. And then were you transferred?

A. No. I got bumped. You see, they were supposed to create a suitable duty for me, which they never done, and naturally when my turn come to get bumped I got bumped; so I was told to try the station, that I could qualify in the station—it is easier work—so I done that.

Q. And you are working in Penn Station now?
A. Yes, but I worked Sunnyside for a while.
Q. You mean after you left Jersey City?
A. Yes.
Q. You worked at Sunnyside?
A. Yes.
Q. For how long?
A. I imagine a month or so, and then I went to Penn Station.
[fol. 30] Q. Then you went over to Penn Station?
A. Yes. You see, it is all ground work over there.
Q. Since you returned to work after your operation have you lost any time?
A. Well, I took off. You mean after the operation—in Jersey City? Yes.

Mr. Schwartz: No, no. Mr. Douglass means primarily at Penn Station, Mr. O'Rourke.

Q. At Penn Station after you returned to work?
A. Yes. I used to call up and ask whether I could hit the relief, see.
Q. Anyway, you are working at Penn Station now?
A. Yes.
Q. As a brakeman?
A. Yes.
Q. At the same rate of pay?
A. Sometimes as a conductor. It all depends.
Q. Have you received any increase in pay since the accident?
A. No.
Q. Have you received any decrease in pay since the accident?
A. No.
Q. Are you having pains now?
A. Yes. It is not pain—more like burning feeling.
Q. Where?
A. Right where I had the operation.
Q. In the lower part of the spine?
A. Yes.
Q. Are you having any other pain?
A. The leg gets numb and my arms.
Q. Which leg gets numb?

A. Both of them—mostly the left.
Q. All the time?
A. No—not all the time, but off and on.
Q. You have a numb sensation off and on?
A. Yes.
Q. How often and how long do you have that?
A. Mostly at home.
Q. Every day?
A. Every day. If I sit too long I get it, and as long as I keep moving I am all right. That is why Dr. Cornell told me to exercise the muscles all the time.
[fol. 31] Q. You say your arms get numb?
A. Yes. Today I came home this morning and lay in bed for a while, and I had the pain. I didn't get undressed. I just lay down, and my arms when I fell asleep were like this, and when I woke up they were numb. I had to gradually force them down.
Q. How often do you get that numb feeling?
A. Any time I get them like this.
Q. When you get them folded across your body?
A. No. If I don't use them—if I hold them up too high, and every so often I have to use Bromo Seltzer.
Q. Why?
A. My stomach. I can't eat.
Q. How often do you get that?
A. Once a month, and it will last two or three days. Sometimes maybe every two weeks I get it.
Q. Your stomach is upset?
A. Yes. It happened this morning.
Q. When did this start—right after the operation?
A. No. It didn't. After I got home, and I told Dr. Brick about it, and he said it is the reaction from the accident. I didn't think it would still affect me after the operation.
Q. Are you having any other difficulties?
A. I have headaches once in a while, too.
Q. Are you dizzy?
A. Sometimes I get a dizzy spell.
Q. How often do you have headaches?
A. When I get this feeling that I want to throw up. I usually get a little headache first and a little headache after.
Q. Did you ever have headache before the accident?

A. No.

Q. Never had a headache before the accident?

A. Unless I had a smack in the jaw or something like that.

Q. You never had a headache before the accident?

A. No.

Q. Never?

A. Not that I can remember. I never went to doctors.

Q. Were you ever sick to your stomach before the accident?

A. Well, yes. I had my appendix removed.

[fol. 32] Q. You say you get dizzy now and then?

A. Yes.

Q. How often?

A. When I get this feeling—like this morning I am sitting on the engine and we are making a move, and they only had two men out; so I was sitting on the engine. We were moving cars. That was my duty and we went to get coupled up. I threw up two or three times.

Q. When you get these nauseous spells do you throw up?

A. Yes.

Q. Always?

A. No. I done it this morning. I heaved. I couldn't get it up yesterday. I don't know why.

Q. Sometimes when you get those dizzy spells do you throw up?

A. Sometimes.

Q. And you never threw up before the accident?

A. No—not unless I had a jag on, when I took a drink once in a while.

Q. Are you having any other difficulties other than those mentioned?

A. Not that I know of.

Q. Were you ever in a hospital before?

A. Just for appendicitis, and I got circumcised.

Q. Only for your appendix?

A. Yes.

Q. Were you ever in a hospital before you were in the New York Hospital—that is where you were, is it not?

A. Oh, yes. I was in the hospital when I had my hands burned.

Q. When was that?

A. The early thirties. Gasoline burned my hands.

Q. Where were you working then?

A. I was just helping a friend of mine. He was going out of business.

Q. You were in the hospital for that accident?

A. Yes. Well, he took me up. They had to bandage me up with some gooey stuff.

Q. Did you ever have any other accidents while working anywhere?

A. Yes, sir. Oh, I had one, yes.

Q. Where was that?

A. Dr. Orlov knows about it. It was in the back, too, but he said it was lumbago.

[fol. 33] Q. When was that?

A. A couple of years before this one.

Q. Sometime in 1946?

A. Yes.

Q. What happened to you?

A. I went to throw a switch.

Q. You threw a switch?

A. I went to throw a switch over and it was stuck and when I forced it I got a pain in the back, and he just taped me up and said it was lumbago or a sprain or something.

Q. Where were you working then?

A. Waldo, Jersey City.

Q. Did you lose any time?

A. Yes.

Q. How much time?

A. Five days. I went back to work that day and I think I lost five more—nine or ten days.

Q. Did you see any doctors besides Dr. Orlov?

A. No.

Q. Are you being treated by any doctor now?

A. No.

Q. When was the last time you saw a doctor?

A. The last time I was to Dr. Cornell, I haven't got the date.

Q. Dr. Cornell was the last doctor you have seen?

A. Yes.

Q. Were you examined by a doctor for the Compensation Board here in New York?

A. Yes.

Q. Dr. Kennedy?
A. Don't mention that guy to me, please.
Q. Was that the doctor?
A. Yes. No. There was no one. They sent me then to the Mercy Hospital to take X-rays.
Q. You were examined at the Mercy Hospital?
A. Yes. They took X-rays, and a week after I went back and met this doctor—I forget his name. He examined me.
Q. While you were away from work did the railroad send you any checks?
A. These nine months I was off?
Q. Yes.
A. Yes. I got relief checks, you know, from the relief department.
Q. Voluntary relief department checks?
A. Yes.
Q. Did you get any other checks?
A. I got $50 every 14 days.
[fol: 34] Q. What did you do with those checks?
A. I just lived on them.
Q. Cashed them?
A. Sure, except the second one they sent me—I didn't get the second one until I went there, and then I got the second one, and they put it down as dead. Yes. They sent it to me every 14 days, I believe it was.
Q. You were not in the Army or the Navy or the Marines, were you?
A. Yes. I was in the Army.
Q. When did you go in the Army?
A. 1942. I was only in about five months.
Q. 1942?
A. Yes—March.
Q. Were you overseas?
A. No. I went as far as Fort Jackson.
Q. Fort Jackson, South Carolina?
A. Yes, sir.
Q. What branch of the service were you in?
A. Infantry—motorized.
Q. Motorized infantry?
A. Yes.
Q. Were you assigned to a division?

A. The 77th. They had mostly all young fellows, and they got rid of those that were a little too old.

Q. How long were you in the Army?

A. A little over five months.

Q. You were honorably discharged, I assume?

A. Yes.

Q. Why were you discharged?

A. They wanted young stuff in there. They were going to go overseas. They had most of them, 20, 22.

Q. How old were you when you were discharged?

A. About—that was about forty—two, I will say. This is 1950. I will be 46 in June.

Q. And when were you discharged?

A. In 1942.

Q. So you were about 38?

A. Yes.

Q. Do you know why you were discharged? Did you have a physical examination before you were discharged?

A. Oh, yes, everybody does.

[fol. 35] Q. Do you have a copy of your discharge certificate?

A. No. I did have it but I was held up and robbed and I had my railroad pass and everything was stole.

Q. Were you released from service at Fort Jackson?

A. Yes.

Q. You were not sent to Fort Dix?

A. No.

Q. You were released directly from Fort Jackson?

A. Yes.

Q. And you came home from Fort Jackson?

A. Yes, and I took a job with the Government but didn't like it.

Q. You don't have any children living with you?

A. No. He is married.

Q. How long is he married?

A. Four years.

Q. Was he in the service?

A. He was in the Navy.

Q. Do you know when he went into the Navy?

A. About 1943, I believe. He was in a year.

Q. Were you drafted or did you volunteer?

A. No. I volunteered. I wanted to be a hero.

Q. Was your wife working while you were in the service?

A. No. Yes. At the time she was, yes.

Q. She was working when you volunteered?

A. Yes. I went down and told them I was single. I had an argument with her. They kept teasing me, saying, "Oh, you are too old. They will not take you." My kid brother was in the Navy at the time. He was just kidding me and I just showed them they would take me.

Mr. Douglass: That is all.

Mr. Schwartz: Mr. Douglass, I would like to make certain requests, one being for copies of the hospital records of both hospitals that Mr. O'Rourke was in, and also copies of any reports of Doctors Orlov and Cornell, and I should also like to have copies of any statements given by Mr. O'Rourke and any of the members of the crew or other witnesses to the accident.

[fol. 36] Mr. Douglass: What type of statements do you mean?

Mr. Schwartz: Any kind.

Mr. Douglass: You want copies of any statements given by any member or members of the crew, no matter to whom they were given?

Mr. Schwartz: That's correct.

Mr. Douglass: You are referring to either operating department or claim agent's statements?

Mr. Schwartz: Yes.

Mr. Douglass: I will furnish you with copies of operating department statements. I will give you a copy of Mr. O'Rourke's statement or statements, and I decline to furnish you with copies of claim agents' statements taken from other employees.

Charles E. O'Rourke.

Subscribed and sworn to before me this 6th day of September, 1950. Richard C. Machcinski, Notary Public, State of New York. Qualified in Westchester County. No. 60-2527875. Certs. filed with New York and Kings Co. Clerk's and Register's Offices. Commission Expires March 3[illegible] 51.

[fol. 37] IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT FOR THE DEFENDANT UNDER RULES OF FEDERAL PROCEDURE 12b(6), 56b, 56d.—May 31, 1951

Sir:

Please take notice that upon the annexed affidavit of A. Harold Frost duly verified the 31st day of May, 1951, and that part of the deposition of the plaintiff with specific regard to the locus of the accident, and the concessions and admissions, and upon the complaint and answer, and upon all of the prior proceedings, the undersigned will move, on the papers herein and by speaking motion, before the Honorable Harold M. Kennedy, one of the Judges of this Court, at his Court in the Courthouse thereof, Room 735, on the 14th day of June, 1951, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order granting the defendant judgment pursuant to Rules 12(b)(6), and 56b, and 56d of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any of the material facts with respect to the alleged legal liability of the defendant, and that the defendant is entitled to judgment as a matter of law.

The specific ground for the defendant's motion is as follows:

(1) From the complaint and the locus of the accident as established by the plaintiff in his deposition, and the concessions and admissions, it is conclusively established that the plaintiff's exclusive remedy to recover for personal injuries incurred while employed by the defendant, is under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901, et seq.

[fol. 38] And, for a further order granting either of the parties a certificate certifying the right to appeal from the order entered herein as if the same were a final order of this Court.

Dated: New York, N. Y., May 31st, 1951.

Yours, etc., A. Harold Frost, Trial Counsel for Defendant, Office & P. O. Address, 11 West 42nd

Street, Borough of Manhattan, 18, City of New York.

To Herbert Zelenko, Esq., Attorney for Plaintiff, Office & P. O. Address, One Park Place, Borough of Manhattan 7, City of New York.

[fol. 39] AFFIDAVIT OF A. HAROLD FROST READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

A. HAROLD FROST, being duly sworn, deposes and says:

That I am trial counsel for the defendant herein and respectfully make this motion pursuant to the agreement made with the attorney for the plaintiff at a pre-trial conference held before this Court.

The plaintiff, an employee of the defendant; has brought this action under the Acts commonly known as the Federal Employers' Liability Act and the Safety Appliance Act to recover damages as a result of injuries suffered by him during the course of his employment.

Pursuant to agreement, the following papers, concessions and admissions are to be considered in the final determination of this motion:

1. The summons and complaint, and the answer.

2. The testimony of the plaintiff in a deposition conducted on February 8th, 1950 pursuant to the Rules wherein such testimony with respect to the locus of the accident which is the point at issue and the basis of this application concedes the following:

(a) On January 28th, 1948, the plaintiff was employed by the defendant as a freight brakeman at the Harsimus Cove yards of the defendant located at Jersey City, New Jersey.

[fol. 40] (b) That as part of his duties he was required to work on car floats, and at the time of the accident, he was on car float #659 doing certain work on freight cars

on the float which was then moored in and on the navigable waters of the United States.

(c) That while he was on the car float moored in and on the navigable waters of the United States, doing certain work on the freight cars thereon, he suffered an injury which is the basis of this law-suit.

(3) The plaintiff's attorney further concedes the following:

That the defendant has complied with all of the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, and that a certificate of compliance was issued to the Pennsylvania Railroad Company, defendant, by the United States Employees' Compensation Commission, which Commission has complete administration of the Longshoremen's and Harbor Workers' Compensation Act. That said certificate of compliance thus issued was in full force and effect at the time that the plaintiff herein was injured.

4. That the defendant made or offered to make payments to the plaintiff pursuant to and in compliance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

5. That the car float on which the accident occurred was known as car float #659 and was a vessel weighing more than eighteen tons.

6. That at the time of the accident the plaintiff was neither a master or member of a crew of the vessel.

7. That the plaintiff was not, at the time of the accident, an officer or an employee of the United States or any agency thereof.

[fol. 41] All of the foregoing are conceded by the attorney for the plaintiff on his behalf as being the conditions which prevailed on the date of the accident.

Accordingly, on the basis of the foregoing, I respectfully submit that the remedy of the plaintiff is exclusively under the provisions of the Longshoremen's and Harbor Workers' Compensation Act and with particular reference to

Section 905 of 33 U. S. C. A. That provision, in part, states as follows:

> "The liability of an employer prescribed in Section 904 shall be exclusive and in place of all other liability of such employer to the employee, * * * entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *."

Section 903 of the said Act provides, in part, as follows:

> "Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) * * *."

Section 904 provides that:

> "Every employer shall be liable for and shall secure the payment to his employees of the compensation * * *."

It follows, as a matter of law, that the defendant is entitled to judgment dismissing the complaint.

The authorities in support of the defendant's position are contained in the defendant's memorandum of law which is respectfully submitted herewith.

A. Harold Frost.

(Sworn to May 31, 1951.)

[fol. 42] In United States District Court

Affidavit of Herbert Zelenko Read in Opposition to Motion

State of New York,
County of New York, ss:

Herbert Zelenko, being duly sworn, deposes and says:

That I am the attorney of record for the plaintiff herein.

That suit has been instituted in plaintiff's behalf under the Federal Employers' Liability Act and the Safety Appliance Act to recover damages thereunder for personal

injuries suffered by the plaintiff through the negligence of the defendant;

That this affidavit and the appended memorandum of law are submitted in opposition to the defendant's motion for judgment dismissing the compliant pursuant to Rules of Federal Procedure 12b(6), 56b, and 56d;

That this is not a frivolous lawsuit but one which affiant believes is fully warranted under the facts and the law pertinent thereto;

That this motion on behalf of the defendant resolves the principal issue in the case to a serious question of law which because of amendments to the Federal Statutes and recent decisions of the Federal Courts, both lower and appellate, appears to be unsettled;

That, for the purpose of this motion, plaintiff concedes that the accident occurred on navigable waters; plaintiff further concedes the facts contained in Paragraphs 2(a) [fol. 43] (b)(c), 3, 4, 5, 6 and 7 of defendant's affidavit sworn to by A. Harold Frost, Esq.;

That, contrary to defendant's contention, your affiant believes that plaintiff's remedy is not under the Longshoremen's and Harbor Workers' Compensation Act since, as his deposition clearly shows, plaintiff did not perform services of a sort performed by longshoremen and harbor workers and was not engaged in maritime employment; plaintiff was a railroader, in every respect, whose duties were in whole in furtherance of interstate commerce, and, as a consequence, entitled to the substantial benefits of the Federal Employers' Liability Act and the Safety Appliance Acts;

That the fact, as appears in his deposition, that plaintiff from time to time was required to place himself, for short periods of time, aboard car floats moored alongside the shore in navigable waters, for the purpose of placing or removing freight cars thereon, and the additional fact that at the moment of his accident he was on a freight car which happened to be aboard a car float moored in navigable waters, are not sufficient to deprive plaintiff of the substantial rights secured to him as a railroader under the Federal Employers' Liability Act and the Safety Appliance Acts;

Wherefore, it is respectfully urged that the defendant's motion for judgment in its favor be in all respects denied and that the issue be allowed to proceed to trial as a cause of action under the Federal Employers' Liability Act and the Safety Appliance Act, or, that if the Court grants the defendant's motion herein that the Court enter an order granting plaintiff a certificate certifying his right to appeal therefrom, as if the same were a final order of this Court.

s/ Herbert Zelenko.

(Sworn to June 12, 1951.)

[fol. 44] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

OPINION

APPEARANCES:

Herbert Zelenko, attorney for plaintiff.

Conboy, Hewitt, O'Brien & Boardman, attorneys for defendant (A. Harold Frost, of counsel).

KENNEDY, J.

When this case appeared upon the trial calendar both counsel called my attention to the fact that the pleadings raised a serious question whether the Federal Employers' Liability Act (45 U. S. C. A. § 51) or the Safety Appliance Act (45 U. S. C. A. § 1 *et seq.*) (upon which statutes plaintiff's claim is based) could properly be invoked by plaintiff even if defendant's negligence were proved, or an unsafe appliance caused plaintiff's injuries. For plaintiff was injured while acting as a railroad freight brakeman on a car float moored in navigable waters. Both counsel assured me that there was no factual dispute at all concerning either the nature of plaintiff's employment when injured or the place of the occurrence of the accident. I told counsel that it seemed to me the rules of civil procedure were broad enough to permit a preliminary determination of this question. Counsel for defendant then moved to dismiss the complaint under Federal Rules of Civil Procedure 12b (6), 56b, and 56c supporting his motion with an affidavit. Counsel

for the plaintiff stipulated in his own affidavit that plaintiff's accident had occurred on navigable waters and specifically conceded the facts which I now outline.

[fol. 45] On January 28, 1948, plaintiff was employed by the defendant as a freight brakeman at the Harsimus Cove yards of the defendant at Jersey City, New Jersey. Part of plaintiff's duty was to work on car floats, and at the time of the accident he was doing brakeman's work on freight cars on Float #659 (owned by the defendant) while the vessel was moored in navigable waters of the United States. Plaintiff further conceded that defendant has made full compliance with all of the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. § 901 *et seq.*, as amended), that defendant has offered to make payments to the plaintiff pursuant to that act, and that none of the statutory exceptions in the act apply, because Float #659 was a vessel of a burden greater than 18 tons, and plaintiff was neither a master or member of the crew of the vessel, nor an officer or employee of the United States or any agency thereof at the time of the accident.

In the light of these conceded facts it seems to me that nothing but a question of law is presented, namely, whether a freight brakeman employed by a railroad and engaged in interstate commerce may invoke either the Federal Employers' Liability Act or the Safety Appliance Act, *supra*, even though he was injured upon a car float in navigable waters of the United States.

Both sides seem to admit that this question was decided in the negative by *Nogueira* v. *New York, New Haven & Hartford Railroad Company*, 1930, 281 U. S. 128. The plaintiff in that case was a freight handler engaged in handling a bale of paper which was, to use the language of the opinion, "a piece of interstate freight". Mr. Chief Justice Hughes, writing for an unanimous court, concluded that plaintiff's remedy under the Longshoremen's and Harbor Workers' Compensation Act was exclusive and that [fol. 46] he could not invoke the Federal Employers' Liability Act even though he was a railway employee.

But plaintiff, citing *Zientek* v. *Reading Co.*, D. C. E. D. Penn., 1950, 93 F. Supp. 875, urges that the *Nogueira* case

was legislated out of existence in 1939 when Congress added a paragraph to the key section of the Federal Employers' Liability Act (45 U. S. C. A. § 51). That addition (53 Stat. 1404) reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

The reasoning in the *Zientek* case is that the 1939 amendment, just quoted, changes the law laid down by the Supreme Court in *Nogueira*, and that Congress intended to put back under the protection of the Federal Employers' Liability Act all railway employees even though their injuries were sustained upon navigable waters. The gist of the decision is that the 1939 amendment was a Congressional enactment *later* than the Longshoremen's and Harbor Workers' Compensation Act and *later* than the *Nogueira* decision. And so, it is said that when Congress by its last word failed to protect the exemption set up by the Compensation Act and the *Nogueira* decision, it impliedly revoked it.

There are at least two decisions directly in conflict with *Zientek* (*Gussie* v. *Penn. R. R. Co.*, 1949, 1 N. J. Super. 293, 64 A. 2d 244, cert. den. 338 U. S. 869; *Job* v. *Erie R. Co.*, S. D. N. Y., 1948, 79 F. Supp. 697).

[fol. 47] In the case last mentioned, Judge Rifkind takes an entirely different view of the meaning of the 1939 amendment to the Federal Employers' Liability Act than was adopted in *Zientek*. Judge Rifkind says that when Congress made it clear by the amendment that an employee was to have the benefit of the Federal Employers' Liability Act, though only part of his duties was in furtherance of interstate commerce, the intent was to do away with the confusion resulting from the fact that railway employees are frequently shifted from interstate to intrastate commerce even within the space of one working day. Judge Rifkind says

that the object of the amendment was to do away with the "moment of injury" rule summarized in *New York, New Haven and Hartford Railroad Co.* v. *Bezue*, 1932, 284 U. S. 415. Certainly Judge Rifkind's position finds support in the printed report accompanying the 1939 amendment and the comments of the Senate Judiciary Committee (Senate Judiciary Report 661, quoted at length in *Southern Pac. Co.* v. *Industrial Accident Commission*, Supreme Court of California, 1942, 120 P. 2d. 880, 883).

Moreover it is difficult to see how the 1939 amendment would have changed the decision in the *Nogueira* case even had it been in existence when that decision was written. The amendment can be paraphrased as follows: if any part of an employee's duty furthers interstate commerce he is deemed to be an employee of the carrier and shall be considered such for the purpose of the benefits of the act. But Nogueira was undubitably engaged in interstate commerce as the opinion shows. The bale which he was handling was "a piece of interstate commerce". The opinion also shows that there was no contest over the question of employment. Hence, even though the 1939 amendment is in truth a later clarification of Congressional policy, it seems to me that the *Nogueira* decision would have come out exactly as it did even though the exact language of the amendment had been before the court.

[fol. 48] The brief for the plaintiff suggests that the *Nogueira* case is capable of being distinguished because the plaintiff there was a freight handler ("longshoreman"), whereas in the case at bar he is a brakeman ("railroader"). I think what plaintiff's counsel really hints at is that the traditional maritime tort-jurisdiction test (locality) has become outmoded, and that the nature of the employment should be a substitute or perhaps an alternative test. In fact, plaintiff cites *Davis* v. *Department of Labor and Industries of the State of Washington*, 1942, 317 U. S. 249, as pointing the way to a twilight zone in the decisions and a "case by case" technique (317 U. S. 249, 256). But there is nothing in the 1939 amendment to suggest that Congress was changing the locality test found in the Longshoremen's and Harbor Workers' Compensation Act. As for the *Davis* case, the Supreme Court there found itself dealing with

another complication arising from the "maritime but local" doctrine by which it had attempted to retreat from the harshness of the *Jensen* case prior to the enactment of the federal compensation act.[1] Mr. Justice Black cites many of these "maritime but local" decisions in a footnote in *Davis* (317 U. S. 249, 253). But although that footnote mentions *Nogueira*, as does the concurring opinion of Mr. Justice Frankfurter and the dissent of Mr. Chief Justice Stone, I find no suggestion in the *Nogueira* opinion that it was in any way affected by the "maritime but local" exception. Indeed one of the leading decisions (*Baizley Iron Works* v. *Span*, 1930, 281 U. S. 222), where the nature of employment ("local") test was vainly invoked to escape the *Jensen* decision, came down on the very same day as the *Nogueira* decision (April 14, 1930). Nowhere in *Nogueira* is the *Baizley* decision spoken of; nowhere in *Baizley* is *Nogueira* mentioned. Justice Holmes, Stone and Brandeis dissented in *Baizley*, but they concurred in *Nogueira*.

[fol. 49] I think the only true meaning that can be taken from *Nogueira* is that a tort committed against a "railroader" on a car float in navigable waters is maritime, and subject exclusively to the Longshoremen's and Harbor Workers' Compensation Act, regardless of the precise task in which he is engaged. If my interpretation of the *Nogueira* decision is correct, then it must be overruled in order to permit this plaintiff to recover under the Federal Employers' Liability Act or the Safety Appliance Act. I am not the one to overrule the decision, whether I like it or not.

The motion to dismiss the complaint is granted.

Harold M. Kennedy, United States District Judge.

[fol. 50] In United States District Court

Notice of Settlement—July 20, 1951

Sir:

Please take notice that an order of which the within is a true copy will be presented for settlement and entry herein

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[1] *Southern Pacific Co.* v. *Jensen*, 1916, 244 U. S. 205; see Robinson on Admiralty, pp. 101-109.

to Honorable Harold M. Kennedy, United States District Judge, at the United States Courthouse, 271 Washington Street, Borough of Brooklyn, City and State of New York, on the 2nd day of August, 1951, at 10:30 o'clock in the forenoon of that day.

Dated: New York, N. Y., July 20, 1951.

Yours, etc., Conboy, Hewitt, O'Brien & Boardman, By: Louis J. Carruthers, Member of Firm, Attorneys for Defendant, Office and Post Office Address, 39 Broadway, New York 6, N. Y.

To: Herbert Zelenko, Esq., Attorney for Plaintiff, Office and Post Office Address, One Park Place, New York 7, N. Y.

[fol. 51] IN UNITED STATES DISTRICT COURT

ORDER ON MOTION FOR JUDGMENT

The defendant having moved this Court for an order granting the defendant judgment dismissing the complaint herein pursuant to Rules 12b(6), 56b and 56d of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any of the material facts with respect to the alleged legal liability of the defendant and that the defendant is entitled to judgment as a matter of law and that from the complaint, the plaintiff's sworn deposition, concessions and admissions, it is conclusively established that the plaintiff's exclusive remedy for personal injuries incurred while employed by the defendant is pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901 et seq., and the motion having regularly come on to be heard on the 13th day of June, 1951,

Now, on reading and filing the notice of motion, dated May 2, 1951, the affidavit of A. Harold Frost, sworn to the 31st day of May, 1951, in support of the motion, and the affidavit of Herbert Zelenko, sworn to the 12th day of June, 1951, in opposition to said motion, and upon all the pleadings and proceedings had herein and after hearing Conboy, Hewitt, O'Brien & Boardman, A. Harold Frost,

Esq., of counsel, for the motion, and Herbert Zelenko, Esq., in opposition thereto, and due deliberation having been had and on filing the decision of the Court, it is on motion of Conboy, Hewitt, O'Brien & Boardman, attorneys for the defendant,

[fol. 52] Ordered that said motion be and the same hereby is granted and that judgment be entered herein dismissing said complaint with $48.50 costs.

Enter, Harold M. Kennedy, U. S. D. J.

In United States District Court

Final Judgment Appealed From—August 9, 1951

A motion having been made by the defendant at a motion part of this Court held at the United States Courthouse, Eastern District of New York, 271 Washington Street, Brooklyn, New York on the 13th day of June, 1951 for an order granting the defendant judgment dismissing the complaint herein pursuant to Rules 12b(6), 56b and 56d of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any of the material facts with respect to the alleged legal liability of the defendant and that the defendant is entitled to judgment as a matter of law and that from the complaint, the plaintiff's sworn deposition, concessions and admissions, it is conclusively established that the plaintiff's exclusive remedy for personal injuries incurred while employed by the defendant is pursuant to the provisions of the Longshoremen's and Harborworkers' Act, 33 U. S. C. A. 901, et seq., and said motion having been granted and an order having been duly made by U. S. District Judge Hon. Harold M. Kennedy on August 3, 1951 granting said motion and directing the [fol. 53] entry of judgment as hereinafter provided, it is on motion of Conboy, Hewitt, O'Brien & Boandman, attorneys for the defendant,

Adjudged that the complaint in this action be and the same hereby is dismissed and it is

Further adjudged that the defendant, The Pennsylvania Railroad Company, residing at Pennsylvania Station, New York City recover of the plaintiff, Charles E. O'Rourke,

residing at 2112 Dorchester Road, Brooklyn, New York the sum of $48.50 cost as taxed.

Dated, August 9, 1951.

Percy Gilkes, Clerk.

[fol. 54] In United States District Court

Notice of Appeal

Please take notice that the above-named plaintiff hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the Final Judgment entered and docketed in the Office of the Clerk of the United States District Court for the Eastern District of New York on the 9th day of August 1951, in which it was adjudged that the defendant have judgment against the plaintiff in the sum of $48.50 and the plaintiff appeals from each and every part of said final judgment as well as from the whole thereof.

Dated, New York, August 16th, 1951.

Herbert Zelenko, Attorney for Plaintiff-Appellant, Office & P. O. Address, One Park Place, Borough of Manhattan, City of New York.

To:

Clerk, United States District Court for the Eastern District of New York. Conboy, Hewitt, O'Brien & Boardman, Esqs., Attorneys for Defendant, 39 Broadway, New York 6, N. Y.

[fols. 55-56] Stipulation. (Omitted in printing)

Designation of Contents of Record on Appeal. (Omitted in printing)

[fol. 57] Stipulation as to Record. (Omitted in printing)

[fol. 58] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 59] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1951

No. 149

Argued January 18, 1952 Decided February 26, 1952

Docket No. 22213

CHARLES E. O'ROURKE, Plaintiff-Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellee

Before: Augustus N. Hand and Clark, Circuit Judges, and Brennan, District Judge

Appeal from a judgment of the District Court for the Eastern District of New York, granting summary judgment dismissing plaintiff's complaint (99 F. Supp. 506).

Herbert Zelenko, Attorney for Plaintiff-Appellant; Richard C. Machcinski, of Counsel.

Conboy, Hewitt, O'Brien and Boardman, Attorneys for Defendant; A. Harold Frost, of Counsel.

[fol. 60] BRENNAN, District Judge:

Appeal from a judgment entered on an order of the district court granting a summary judgment dismissing plaintiff's complaint which sounds in negligence, and seeks to recover money damages on account of injuries received. The motion was made pursuant to Rules 12b (6), 56b and 56d of the Federal Rules of Civil Procedure, and is based upon the pleadings, affidavits of attorneys, the deposition of appellant, and certain concessions appearing in the record.

The complaint is based upon the Federal Employers' Liability Act (45 U. S. C. A. 51, etc.), hereinafter referred to as "Liability Act," and alleges violations of the Safety Appliance Act (45 U. S. C. A. 1, etc.). The lower court held that the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. 901, etc.), here-

inafter referred to as "Compensation Act," are applicable, and the appellant's remedy thereunder is exclusive.

The appellant was employed as a freight brakeman in the yards of the defendant at Jersey City, New Jersey. He was a regular member of a drill crew whose duties were to place freight cars so as to make up freight trains. The appellant from time to time released the brakes on or coupled the freight cars of his employer while they were located on car floats in navigable waters. He was injured while releasing a defective handbrake upon one of such cars preparatory to its removal.

The lower court relied upon the case of *Nogueira* v. *New York, New Haven and Hartford Railroad Co.*, 281 U. S. 128, and concluded that, although appellant was a "railroader," any tort committed against him upon a car float in navigable waters in maritime and subject exclusively to the Compensation Act, regardless of the precise task in which he was engaged at the time of the injury. The conclusion results from the application of the "locality test," authority [fol. 61] for which is claimed in the above decision and in the Compensation Act.

When the *Nogueira* case was before this court (32 F. 2nd 179), Judge Swan expressly reserved decision on the question which is now before us. We interpret the *Nogueira* decision in the Supreme Court as holding that Nogueira's employment was maritime in nature, and the injury occurring on navigable waters, the remedy afforded by the Compensation Act was exclusive. Nogueira was a railroad employee engaged when injured as a freight handler in loading a ship. There appeared to be no serious contention made but that his employment was traditionally maritime in nature. The main contention was that the car float was an adjunct to railroad transportation in interstate commerce. We find no language in the Supreme Court opinion which adversely affects the statement in the decision of the same case in this court: "Moreover, it does not follow that the mere locus of the accident necessarily determines the right" (at p. 182). We do not believe that the *Nogueira* decision controls here.

The designation of appellant as a brakeman bespeaks a specialized railroad employment quite apart from maritime service. The releasing of handbrakes, or the coupling of cars, is distinctively a railroader's job requiring par-

ticular training and accompanied with particular risks peculiar to the business of railroading alone. To hold that one so employed and engaged is in maritime service is to ignore reality. Such a conclusion can only be reached by making the locality of the accident the sole test of maritime employment and the determining factor in coverage afforded by the Compensation Act. We find no warrant either in the *Nogueira* decision or in law for such a test. The Compensation Act, in Sections 903 (a) and 902 (4), by indirection at least, provides that employment in maritime service and injury upon navigable waters are the bases of coverage. Such provisions, although they may be related, are sepa-
[fol. 62] rate, and the finding of the existance of an injury occurring upon navigable waters does not in itself require a finding of maritime employment.

No authoritative precedent is cited which requires the result below. It is true that the case of *Buren* v. *Southern Pacific Co.*, 50 F. 2nd 407, appears to be in accord with that decision. In that case the plaintiff was actually a passenger upon the boat during the period between the performance of his duty to tighten the brakes on the cars when they entered the boat and to loosen them as they were removed therefrom. The complaint in its allegation as to Buren's duties was much more broad than in the instant case insofar as it alleges his duties in connection with the loading and unloading of the freight cars upon or from the boat. Here we find no such allegation, and appellant's physical presence upon the boat appears to be only occasional and incidental. As in the *Nogueira* case, the main contention seems to have been that the boat upon which Buren was injured was a part of defendant's railroad system. If that decision is construed to hold that the injury occurring on navigable waters in itself requires exclusive application of the provisions of the Compensation Act, we respectfully differ with it.

The principle that torts occurring upon navigable waters determine admiralty jurisdiction is not in question here. Here we have a problem concerning the coverage afforded under one or two remedial statutes which must be determined by the provisions thereof, "* * * for the question still is to what cases does that act (Compensation Act),

apply according to its terms" (*Nogueira* v. *N. Y., N. H. and H. R. R. Co., supra* at 137).

The legislative history of both statutes has been explored in prior decisions to determine congressional intent. Their recitation here would be useless repetition. The general scheme of the Compensation Act was to provide compensa-[fol. 63] tion to employees engaged in maritime employment for disability or death resulting from injury occurring upon the navigable waters of the United States (*Nogueira* v. *N. Y., N. H., and H. R. R. Co., supra* 131). The purpose of the Liability Act was similarly to provide to railroad employees a remedy for injury or death while engaged in interstate commerce. Its coverage has been extended by the 1939 Amendment which abolished the so-called "moment of injury" rule. We do not believe that the 1939 Amendment to the Liability Act is vital here, although its application has resulted in conflicting decisions (*Job* v. *Erie*, 79 F. Supp. 698; *Zientek* v. *Reading Co.*, 93 F. Supp. 875). Certainly it has extended the protection given to railroad employees by broadening the requirement as to employment in interstate commerce. Moreover, the Liability Act specifically refers to negligence on the part of an employer due to defects in its "* * * boats (or) wharves * * *" The congressional intent as to its coverage would therefore seem to extend to railroad employees injured while engaged in railroad work on navigable waters, and the fact that the injury happened while the plaintiff was on such waters does not mean that his sole remedy is under the Compensation Act. Our problem, however, is not one of employment in interstate commerce, but of maritime employment, as the term is used in the Compensation Act. This decision rests upon the consideration of that question.

The language of the Compensation Act and the legislative scheme prompt the holding that appellant was a railroad employee injured while engaged in distinctive railroad work. He was not employed in maritime employment at the time of his injury within the meaning of the Compensation Act, and his rights are not limited thereby.

Reversed.

[fol. 64] CLARK, Circuit Judge (dissenting):

I would affirm on the persuasive opinion of Judge Kennedy below, D. C. E. D. N. Y., 99 F. Supp. 506, which, in my view, correctly evaluates the precedents and the legislative policy. The decision here rejects traditional tests to rely upon something found in the nature of the employer's job, a distinction so vagrant and fleeting that it apparently cannot be stated more precisely than something "distinctively a railroader's job," or a "specialized railroad employment," requiring particular training and with particular risks. But how that can be given anything like finite application to distinguish between a "freight handler" manipulating freight, and a "railroader" manipulating brakes, on a car-float, I am unable to perceive. Moreover, as is conceded, the very case of the freight handler was that of a "railroader" nonetheless granted compensation. *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128. Note, too, the opinion of Chief Justice Hughes, 281 U. S. at page 134: "A car float in navigable waters is subject to the maritime law like any other vessel. * * * No exception is made of the employees of a railroad company employed in maritime service on the navigable waters of the United States or with respect to the question whether such employment was in connection with an extension of railroad transportation."

To me the *Nogueira* case seems wholly controlling in both its reasoning and its holding. And there is a very strong current of judicial opinion elsewhere to that effect. An exact precedent is found in *Buren* v. *Southern Pac. Co.*, 9 Cir., 50 F. 2d 407, where the Supreme Court denied certiorari, 284 U. S. 638. Other cases of "railroaders"—brakemen—on car floats include *Richardson* v. *Central R. Co. of New Jersey*, 233 App. Div. 603, 253 N. Y. S. 789; *Gassie* [fol. 65] v. *Pennsylvania R. Co.*, 1 N. J. Super. 293, 64 A. 2d 244, certiorari denied 338 U. S. 869; and *Job* v. *Erie R. Co.*, D. C. S. D. N. Y., 79 F. Supp. 698. And there are analogous cases such as *Parker* v. *Motor Boat Sales*, 314 U. S. 244, involving a janitor actually testing a motor boat in operation at the time of injury; or *Travelers Ins. Co.* v. *McManigal*, 5 Cir., 139 F. 2d 949, *Travelers Ins. Co.* v. *Branham*, 5 Cir.,

136 F. 2d 873, and *Mamat* v. *United Fruit Co.*, D. C. S. D. N. Y., 39 F. Supp. 103, involving by employment purpose a carpenter, a concrete pourer, and a member of a shore gang respectively, but brought under the Compensation Act by their activities when injured. The only case distinctly to the contrary appears to be *Zientek* v. *Reading Co.*, D. C. E. D. Pa., 93 F. Supp. 875, which rests upon a reading of the 1939 amendment to the F. E. L. A. disavowed here.

Here the employer was engaged in a maritime activity in which it was the employee's regular duty to assist. That the employee at other times performed shore railroad duties was of no moment. It was his "actual duties" at the time which controlled. *Long Island R. Co.* v. *Lowe*, 2 Cir., 145 F. 2d 516, 518; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 260. As the Court said in *Parker* v. *Motor Boat Sales, supra*, 314 U. S. at pages 246, 247, with reference to the claim that the Act did not apply because of the local character of the employment: "This proposition cannot be rested on the ground that Armistead, hired primarily as a janitor and porter, was predominantly a non-maritime employee. For, habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made."

[fol. 66] These cases seem to me to show as clear a line of demarcation as we can reasonably expect in the difficult realms of jurisdiction so important and apparently so necessary to our federated organization of government. But now we give these up for what seems to me a chartless morass.

[fol. 67] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of February, one thousand nine hundred and fifty-two.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges; Hon. Stephen W. Brennan, District Judge

CHARLES E. O'ROURKE, Plaintiff-Appellant,

-v.-

THE PENNSYLVANIA R. R. COMPANY, Defendant-Appellee

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell.

[fol. 68] [Endorsed:] United States Court of Appeals for the Second Circuit. Charles E. O'Rourke v. The Pennsylvania R. R. Co., 149. Judgment. United States Court of Appeals, Second Circuit. Filed February 26, 1952. Alexander M. Bell, Clerk.

[fol. 69] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 60

THE PENNSYLVANIA RAILROAD COMPANY, Petitioner,

vs.

CHARLES E. O'ROURKE

ORDER ALLOWING CERTIORARI—Filed October 13, 1952

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.